

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

ORIGINAL

74-1037

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

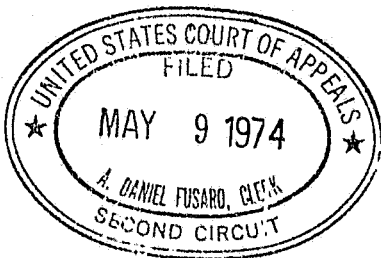
v.

LECLUCA GUARINO,

Defendant-Appellant.

*On Appeal From The United States District
Court For The Southern District Of New York*

DEFENDANT-APPELLANT'S BRIEF



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POINT I

DEFENDANTS, GUARINO, CAPRA AND
DELLA CAVA CLAIM STANDING TO SUP-
PRESS THE FRUITS OF THE TOLEDO
SEARCH BECAUSE THEIR REASONABLE
EXPECTATION OF PRIVACY WAS
VIOLATED (Replying to the Government's
Point I)

Contrary to the Government's assertion at page 31 of its brief, the defendants do not claim that standing should be afforded them because "there was a balance due them on the sale". (Government's brief, page 31). The defendants contention, supported by the evidence at the hearing and at the trial is that a checked and locked suitcase is impervious to Governmental intrusion unless the requirements of the Fourth Amendment are satisfied. No abandonment is evidenced by checking a suitcase with a bailee nor is there any reason for a bailor to expect that his privacy in the suitcase will be invaded without his consent.

The Government's reliance on railroad policy permitting inspection of suitcases makes no mention of Section 4973.19, Ohio Revised Code, which states:

"A company which avails itself of sections 4973.17 and 4973.18 of the Revised Code may make needful regulations to promote the public convenience and safety in and about its depots, stations, and grounds, not inconsistent with law, and print and post such regulations conspicuously upon its depot or station buildings.

Policemen appointed under such sections shall enforce and compel obedience to such regulations. The keeper of jails, lockups, or station houses in each county shall receive persons arrested for the commission of an offense against such regulations or the laws of the state upon or along the railroad or premises of such company."

The policy of the railroad, therefore, enforced pursuant to regulations had the force and effect of State law and policemen appointed under the Ohio Revised Code, as Captain Blevins was, acted in behalf of the State to "compel obedience to such regulations." The opening of the suitcase came after.

"Blevins too had become concerned about the contents of the suitcase, having been present on a prior occasion when the makings of pipe bombs were discovered in a parcel stored in the Penn Central Station in Cleveland (JA 1400-1401)." (Government's brief, page 30).

POINT II

THE DEFENSE ATTACK UPON EATON'S AFFIDAVIT ON THE GROUNDS OF MATERIAL PERJURY WAS NEITHER SPECIOUS NOR CONTRIVED (Replying to Appellee's Point II)

The Government's effort, even at this late date, to view the defense assertion of perjury as specious and contrived is not in keeping with its obligations to disclose relevant and useful material to the defense.

Subsequent to the sentence herein, it was learned by the defense that the whereabouts of Donald Bode was known to Detective Eaton in the Summer of 1973. After being directed by Judge Frankel to ascertain from the New York City Police the whereabouts of Donald Bode, the Government stated to the Court that "it has no idea where Bode is." (1542).*

With regard to the reasonableness of the interception of the defendant Della Cava's conversations between December 19 and January 6, the Government's view that an application for an amendment of that warrant would be merely a "mechanical process" takes no note of the fact that on December 19, Della Cava's prior conversations were thought to be narcotic

* In a statement to defense counsel dated March 7, 1974, Bode stated: (1) that he did not know Joseph Della Valle, (2) that he never had phone conversations with Joseph Della Valle as alleged by Detective Eaton in his affidavit, (3) that in the Summer of 1973, he had met Detective Eaton in Queens, and (4) that Detective Eaton knew that he was still on probation in Supreme Court, Queens County, in 1973.

related only because they were thought to be Joseph Della Valle's conversations. Removal of the fact that they were Joseph Della Valle's conversations left the monitoring officers innocuous conversations of an anonymous person. Yet, Assistant District Attorney Fishman relied solely on Eaton's expertise and advised Eaton to keep listening to the anonymous speaker.

The Government did not answer directly defendants' attack upon the probable cause in the amendment of the eavesdropping warrant dated January 6, 1972. United States v. Santana, 485 F. 2d 365 (2nd Cir., 1973), is instructive. Where narcotics officers were surveilling a meeting place for persons engaged in narcotics activities, saw a major narcotics violator carrying a brown paper bag on two occasions and had been told by an anonymous informant that this person was heavily engaged in narcotics activities, "the Government conceded that the officers did not have probable cause." (Id. at 367). The quantum of facts in Santana was only sufficient "to meet the rather lenient test for a stop which the Supreme Court, reversing this Court, applied in Adams v. Williams," (Id. at 368). The combination of events described in the affidavit supporting the eavesdropping warrant of January 6, 1972 is not more than what was thought in Santana to authorize a "stop" and which the Government then conceded did not amount to probable cause.

CONCLUSION

FOR THE ABOVE STATED REASONS AND THE
REASONS AND ARGUMENTS OF APPELLANT'S
MAIN BRIEF, THE JUDGMENT OF CONVICTION
SHOULD BE REVERSED.

Respectfully submitted,

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M. V. Guarino

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of May, 1974 at No. M. S. Cristofani, R.F.C. deponent served the within 1321st upon M. S. Cristofani the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 9 day of May 1974

[Signature]
.....
William Bailey
.....
WILLIAM BAILEY

**Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973**

